A **PERBADANAN PEMBANGUNAN PULAU PINANG**

v.

TROPILAND SDN BHD

B HIGH COURT MALAYA, PULAU PINANG
BALIA YUSOF WAHI J
[CIVIL SUIT NOS: 22-314-1994 & 22-426-2000]
14 FEBRUARY 2009

C ***LEGAL PROFESSION:*** *Discharge of solicitors - Application to disqualify solicitor from appearing as counsel - Solicitor previously substantially involved in case while serving as a High Court judge - Perception of general public - Appearance of impropriety - Legal Profession (Practice & Etiquette) Rules 1978, r. 5(a)*

D ***CIVIL PROCEDURE:*** *Solicitor - Discharge of counsel - Application to disqualify solicitor from appearing as counsel - Solicitor previously substantially involved in case while serving as a High Court judge - Perception of general public - Appearance of impropriety - Legal Profession (Practice & Etiquette) Rules 1978, r. 5(a)*

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This was an application by the plaintiff seeking to disqualify one Dato' RK Nathan from appearing as leading counsel for the defendant in the two consolidated suits herein. The plaintiff's objection was premised primarily on the ground that Dato' RK
F Nathan had been substantially involved in the case while serving as a judge of the High Court in Penang. It was further contended that there was a great risk that the impartiality of the court as an institution might be questioned because of an appearance of impropriety.

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Held (allowing the application):

(1) What the court was more concerned with in this case was not whether there was any conflict arising in the handling of
H the matter by Dato' RK Nathan but the perception of the general public and whether there was any appearance of impropriety in the matter being handled by him. To seek and maintain "the best interest of the administration of justice" as envisaged in r. 5(a) of the Legal Profession (Practice &
I Etiquette) Rules 1978, it is necessary to adopt the strict approach. The solemn oath of upholding justice to both

parties taken by Dato' RK Nathan when he was the presiding judge in this very matter must in the circumstances of the case be maintained. While there was no doubt that the role of counsel is to seek justice and Dato' RK Nathan was no exception, what would be the general public's perception of him fighting for the cause of only one of the parties now? Thus, the appearance of impropriety was real and this was sufficient to disqualify Dato' RK Nathan from acting as counsel for the defendant in this case. (paras 10 & 11)

Case(s) referred to:
Black v. Taylor [1993] 3 NZLR 403 ***(refd)***
Everingham v. Ontario [1992] 88 DLR (4ht) 755 ***(refd)***
Grimwade v. Meagher & Ors [1995] Victorian Reports Vol 1, 446 ***(refd)***
Kayla Beverly Hills (M) Sdn Bhd & Anor v. Quantum Far East Ltd & Ors; Uma Devi R Balakrishnan (Third Party) [2003] 4 CLJ 587 HC ***(refd)***
Martin v. Gray 77 DLR (4th) 249 ***(refd)***
Nora Chisolm v. Transouth Financial Corporation [2000] US Dist Lexis 8483 ***(refd)***
RS Muthiah v. Pembinaan Fiba Sdn Bhd [2004] 2 CLJ 917 HC ***(refd)***
Thevenaz and Thevenaz [1986] FLC 91-748 ***(refd)***
Yee Chang & Co Ltd v. NV Koninklijke Paketvaart Maarschappij [1985] MLJ 131 ***(refd)***

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 4, 5(a)
Rules of the High Court 1980, O. 35 r. (1)

For the plaintiff - Dato' V Sithambaram (Navaratnam & Lai Mei Fong with him); M/s Murad & Foo
For the defendant - Dato' RK Nathan (Vinod Kamalanathan & Clement Cheng with him); M/s Clement, Dawn & Assoc

Reported by Suresh Nathan

JUDGMENT

Balia Yusof Wahi J:

Facts

[1] By way of summons in chambers in encl. 71, the plaintiff filed an application seeking to disqualify Dato' RK Nathan as the leading counsel for the defendants in the two consolidated suites herein. The two civil suits are civil suits no. 22-314-94 and 22-426-2000. The application in encl. 71 is as follows:

1) That Dato' RK Nathan be disqualified or prohibited from appearing as leading counsel for the defendant in all further proceedings in the above suits under the inherent jurisdiction of the court.

2) Costs of the application.

3) Further or other relief.

[2] The objection of the plaintiff against Dato' RK Nathan in acting as the leading counsel for these civil suits is premised primarily on the ground that Dato' RK Nathan who was a judge in the High Court of Penang had handled the matters and has presided over them on a number of occasions. Between 8 August 2001 and 25 August 2004 it has been alleged that Dato' RK Nathan has presided over the matter for no less than 13 times. On 24 April 2002 and 29 May 2003 consent orders were made before Dato' RK Nathan between the parties in the suits. The said consent orders were in respect of two other summons in chambers with regard to the striking out of certain paragraphs in the defendant's defence and counter claim and the other, with regard to the agreement of the parties on the applicability of O. 35 r. (1) of the Rules of the High Court 1980. After the retirement of Dato' RK Nathan, the case was finally disposed off before another judge, Dato' Mohamad Zabidin who allowed the plaintiff's claims in both suits and dismissing the defendant's counter claim with costs. The defendants have filed an appeal against the said decision to the court of appeal and at the same time filed an application for stay of execution on 9 July 2008 (encl. 49). Dato' RK Nathan who has since retired, is now back in practice and came into the picture by appearing as the leading counsel for the defendant. The plaintiff objected to such appearance and hence this application for his disqualification.

Plaintiff's Contention

[3] Counsel for the plaintiff contends that the appearance of Dato' RK Nathan as leading counsel for the defendant in the stay of execution application in encl. 49 and which is still pending in this court is improper because of his substantial involvement in the case while serving as a judge of the High Court in Penang. Counsel further contends that there is a great risk that the impartiality of the court as an institution might be questioned

because of an appearance of impropriety. The plaintiff also relies on rr. 3, 4 & 5 of the Legal Profession (Practice & Etiquette) Rules 1978.

Defendants' Reply

[4] On the part of the defendant, it is contended that while it is true that the suits were brought up before Dato' RK Nathan as a judge of the High Court at Penang, the issues dealt with by him were on matters of getting up the case for trial. This includes case management and other directions on the filing of documents between the parties. The directions given by Dato' RK Nathan were mainly for the smooth running of the case. No decisions were made by him which may give rise to impartiality and the grounds raised by the plaintiff in the application are frivolous and vexatious. The defendant further contends that the plaintiff's reliance on rr. 3, 4 and 5 of the Legal Profession (Practice & Etiquette) Rules 1978 is misplaced. No prejudice is caused to the parties and on the contrary the presence of Dato' RK Nathan will be beneficial to the legal fraternity considering his past experience and expertise. So says the defendant.

Court's Decision

[5] Foremost, it is trite that the right of counsel to appear in court is not absolute. Their conduct on legal proceedings which may affect the administration of justice is subject to the court's supervisionary jurisdiction. *Kayla Beverly Hills (M) Sdn. Bhd. & Anor v. Quantum Far East Ltd & Ors: Uma Devi R. Balakrishnan (third party)* [2003] 4 CLJ 587, *RS Muthiah v. Pembinaan Fiba Sdn. Bhd.* [2004] 2 CLJ 917. The court has the right and duty to supervise the conduct of its solicitors and the court would be failing in its duty if it fails to do this supervisory power. Similarly, a solicitor owes a duty to the court to conduct litigation with due propriety and to assist in promoting in his own sphere, the cause of justice. (*Yee Chang & Co. Ltd v. NV Koninklijke Paketvaart Maarschappij* [1985] MLJ 131). The court has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and as part of that jurisdiction, to prevent a member of counsel appearing for a particular party in order that justice should not only be done but be seen to be done (*Grimwade v. Meagher & Ors.* [1995] Victorian Reports Vol. 1, 446).

[6] Having considered the matter in totality, I do not think that there is any breach of rr. 3 and 4 of the Legal Profession (Practice & Etiquette) Rules 1978 and I also do not see how the issue of bias should crop up in this matter as submitted by the learned counsel for the defendant. I am however very much persuaded by the arguments and the submissions of the learned counsel for the plaintiff in that, seen in the light of the provisions of r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978, whether the conduct of the case by Dato' RK Nathan would be incompatible with the best interest of the administration of justice. What is "incompatible with the best interest of the administration of justice" is a question of fact to be decided on the merits of each case. Speaking of conflict, the objective test to be applied is not whether there is actual conflict but that there be no appearance of conflict. It has also been said that it is the appearance of fairness in the eyes of the public that is fundamentally important. Sopinka J in the case of *Martin v. Gray* 77 DLR (4th) 249 stated that the *sina qua non* of the justice system is that there be an unqualified perception of its fairness in the eyes of the general public. There is first of all the concern to maintain the high standard of the legal profession and the integrity of our system of justice, and to achieve this, a strict test ought to be observed in ensuring that not only there be no actual conflict but there be no appearance of conflict. The family court of Australia in *Thevenaz and Thevenaz* [1986] FLC 91-748 said:

> It is of utmost importance that justice should not only be done but should appear to be done. In the circumstances of the present case, there is a risk which may well be merely theoretical but still exists, that justice might not appear to be done.

[7] The appearance of conflict certainly renders it incompatible with the best interest of the administration of justice. In the eyes of a fair minded reasonably informed member of the public, the appearance of Dato' RK Nathan in the instant case would certainly in my view be subject to some querries. Dato' RK Nathan has presided over the matter before. A fair minded member or the public would not have expected that Dato' RK Nathan would act for any of the parties herein after having been involved in the matter before. Questions are bound to be asked. In *Nora Chisolm v. Transouth Financial Corporation* [2000] US Dist Lexis 8483, the court ordered the disqualification of the former

judge from acting as attorney because of the existence of an appearance of impropriety. Head note No. 8 of the said case states as follows:

> 8. A discrete problem is that of a judge appearing as counsel in a case that was filed in his or her former court before he or she resigned. The appearance is improper. In such cases, the judge sitting in the case has an affirmative obligation, pursuant to Code of Conduct for United States Judges Canon 3B(3), to take appropriate steps to disqualify the former judge as counsel. A majority of the Committee is of the view that this rule applies whether or not the court has an individual calendar and whether or not the former judge who is appearing as counsel had any involvement with the case. The public is unlikely to be aware of judges' contacts with the case, and litigants have no way of assuring themselves there was no such contact. There is a substantial risk that the impartiality of the court as an institution might be questioned.

[8] On the power and the role of the court, Mandie J in *Martin v. Gray (supra)* referred to the position in Canada and set out the following passages from a decision of the full court of the Ontario Divisional Court in *Everingham v. Ontario* [1992] 88 DLR (4ht) 755 at pp. 761-762:

> It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached.
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> The issue here is not whether or not the rule was breached, or whether the solicitor worked for the government. Nor is it solely whether the patient lost confidence in the process. The issues is whether a fair-minded reasonably informed member of the public would conclude that the administration of justice required the removal of the solicitor ...
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> The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public ... The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice ...

[9] The disqualification of a counsel is not imposed as a punishment for misconduct. Rather it is a protection for the parties and the wider interest of justice. The legitimacy of judicial decision depends in large part on the observance of the standards of procedural justice. There is the courts' concern with the administration of justice in a particular case and in the generality of cases and with the associated basic need to preserve confidence in the judicial system. The right to a fair hearing in the courts is an elementary but fundamental principle of our system of justice. The courts have an inherent jurisdiction to control its own processes except as limited by statute and as an incident to that inherent jurisdiction, it shall determine which persons should be permitted to appear before it as advocates. (*Black v. Taylor* [1993] 3 NZLR 403.)

[10] What the court is more concerned with in this case is not whether there is any conflict arising in the handling of the matter by Dato' RK Nathan. The court is more concerned with what would be the perception of the general public and whether there is any appearance of impropriety in his so handling the matter. In my view, to seek and maintain "the best interest of the administration of justice" as envisaged in r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978, the strict test as adopted in the other jurisdictions must be adopted. I have not the slightest doubt about the necessity to adopt that approach in our system of justice.

[11] The solemn oath of upholding justice to both parties taken by Dato' RK Nathan when he was the presiding judge in this very matter must in the circumstances of the case be maintained. While I have no doubt that the role of counsel is to seek justice, and Dato' RK Nathan is no exception, what would be the general public's perception of him fighting for the cause of only one of the parties now? In my view the appearance of impropriety is real and this is sufficient to disqualify Dato' RK Nathan from acting as counsel for the defendant in this case. Following that, the plaintiff's application in encl. 71 is hereby allowed in terms as prayed.

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